No. 14076.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL VIDALES, also known as ANGEL VIDALES-GALVAN,
Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

JURISDICTION OF THE COURT.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903). [Tr. 11.]

Judgment for the defendant was docketed and entered on August 11, 1953, and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Section 1291.

II.

STATEMENT OF THE CASE.

Appellant, having been denied admittance to the United States by an excluding decision of the Immigration and Naturalization Service holding him to have expatriated himself, sought a declaration of nationality from the District Court of the United States for the Southern District of California.

Said District Court determined that though the appellant was a citizen by birth in the United States, he subsequently expatriated himself under Section 401(j) of the Nationality Act of 1940, as amended (8 U. S. C. A. 801(j)) by remaining outside the jurisdiction of the United States since September 27, 1944, for the purpose of avoiding or evading training and service in the Armed Forces of the United States in time of war [Tr. 13] and the Court ruled in favor of the defendant and adjudged that the appellant is not a national or a citizen of the United States. [Tr. 16.]

III.

STATUTES INVOLVED.

Section 401(j) of the Nationality Act of 1940 (8 U. S. C. A. 801(j)) provides in pertinent part as follows:

> "§801. *General means of losing United States nationality.*
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * * * * *
>
> (j) Departing from or remaining outside the jurisdiction of the United States in time of war or dur-

ing a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. As amended Jan. 20, 1944, c. 2, §1, 58 Stat. 4; July 1, 1944, c. 368, §1, 58 Stat. 677; Sept. 27, 1944, c. 418, §1, 58 Stat. 746."

IV.

STATEMENT OF FACTS.

The appellant was born in the United States at Anaheim, California, on July 11, 1922, which event made him a citizen of the United States by virtue of Amendment 14 of the Constitution. When he was about three years old, his parents moved to Mexico taking him with them. The appellant remained in Mexico until about January, 1946, when he returned to the United States. He remained in the United States until about July, 1948. [Tr. 8.] He knew almost all of his life that he was a citizen of the United States, and for more than fifteen years it was his intention to come to the United States. He also knew that the United States was at war and that he had an obligation during the years 1942-1945, inclusive, to offer his services in the Armed Forces of the country, he having become twenty-one years of age in 1943. [Tr. 12.]

Appellant left the United States in 1948, and when he sought to return the same year, he was excluded by the Immigration Service when it was determined after hearing that he had forfeited United States citizenship by remaining outside the jurisdiction of the United States for the purpose of avoiding or evading training and service in the Armed Forces of the United States in time of war. [Tr. 9.]

V.
QUESTIONS INVOLVED.

Specifications of Error listed by the appellant in his Opening Brief as Nos. 1, 3, 4 and 5 are all questions of fact raising the sole factual question:

Did the appellant, as a matter of fact, expatriate himself by remaining outside the jurisdiction of the United States for the purpose of avoiding or evading training and service in the land or naval forces of the United States?

Specification of Error No. 2 by the appellant raises a question as to the admissibility of evidence which may be stated:

Are previous statements of a party to an action, conflicting with his present testimony admissible against him, and do they constitute substantive evidence against him?

VI.
ARGUMENT.

A. The Court Properly Received in Evidence Defendant's Exhibit A.

This question while last stated under "Questions Involved" above should be taken up first, as no discussion of the evidence will be pertinent unless it is first determined that it is admissible and has probative value.

Defendant's Exhibit A consists of a transcript of appellant's testimony before a Board of Special Inquiry held at Calexico, California, on August 6, 1948, at which time appellant's right to enter the United States was being determined.

The previous testimony of the appellant as contained in Exhibit A was first called to the attention of the appellant and first entered the case in the cross-examination of the appellant [Tr. 31], and in each case where appellant's testimony in the trial differed from his testimony as contained in Exhibit A, the question was read to him together with his answer and he was then asked if that question was asked and if that was his answer. [Tr. 32-42.]

Exhibit A was then marked for identification, and the Clerk asked "The whole thing or just this one page?" He was answered "The portion that refers to the hearing only." [Tr. 46.] And thereupon Ralph J. Lloyd, Chairman of the Board of Special Inquiry who acted as Spanish interpreter at said hearing, testified as to the authenticity and correctness of the transcript, and explained in detail how the testimony therein was taken. At the close of Mr. Lloyd's cross-examination [Tr. 50], the following took place:

> "Mr. Grean: I offer Defendant's Exhibit A for identification in evidence.
>
> The Court: It may be received.
>
> Mr. Grean: For the purpose of the contradictory statements called to the attention of the Court.
>
> The Clerk: Exhibit A in evidence.
>
> Mr. Widoff: That is just for the purpose of the contradictory statement, is that correct, counsel?
>
> Mr. Grean: That is correct, unless counsel wants to stipulate that the whole transcript be considered by the Court.
>
> Mr. Widoff: That is, I don't think it would be admissible otherwise except to impeach the witness.

The Court: It will be received. As a matter of fact, you did not mark the questions that were answered 'no.' Did you?

Mr. Grean: I did not mark, them no." [Tr. 50-51.]

Counsel for the appellant cites *Wong Wing Foo v. McGrath,* 195 F. 2d 120 (C. A. 9th, 1952), in support of his contention that it was error to admit Exhibit A. In that case, however, the testimony of an alleged uncle before an administrative hearing was sought to be introduced as evidence while the uncle was available to testify as a witness.

His testimony was clearly hearsay. He was not a party to the action and the Court held that the exception to the Hearsay Rule where such a witness is dead or otherwise not available was not applicable. The inadmissibility of the uncle's testimony was obvious. There was no opportunity for him to be cross-examined on his previous testimony.

However, in the instant case, we are not dealing with testimony of third persons given in another action. We are dealing here with admissions of the appellant, a *party* to the action present in court with an opportunity to explain the previous statements now conflicting with his present testimony.

Wigmore in Volume IV, page 4 of his works on Evidence (3rd Ed.) states:

> "The Hearsay Rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed admissions."

Wigmore states that the probative value of admissions is twofold:

First, all admissions, may furnish, as against the opponent the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; and

Second, all admissions, used against the opponent, satisfy the Hearsay Rule, and when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances.

> "* * * an admission is equivalent to affirmative testimony for the party offering it."
>
> IV, Wigmore on Evidence, Sec. 1048, p. 6.

Previous statements of the party to an action, conflicting with his testimony, constitute substantive evidence against him.

> *Harrison v. United States,* 42 F. 2d 736 (C. A. 10th, 1930).

The Rule authorizes the receipt of any statement made by an opponent as evidence in contradiction and impeachment of his present claim. Evidence offered to prove admissions need not have been given in a courtroom or under oath but the fact that it was so given, does not detract from its admissibility.

> *Milton v. United States,* 110 F. 2d 556, 560 (C. A. D. C., 1940).

See also:

> *Warde v. United States,* 158 F. 2d 651 (C. A. D. C., 1946).

And particularly:

> *Schoeps v. Carmichael,* 177 F. 2d 391 (C. A. 9th, 1949),

in which Judge Bone in a footnote No. 11 at page 397 enunciates completely the proposition stated above.

Not only are the courts consistent in ruling upon the admissibility of admissions, but they emphasize the probative value thereof or as Wigmore says:

> "An admission is equivalent to affirmative testimony for the party offering it."

The Court in *Harrison v. United States, supra,* states that such testimony constitutes substantive evidence while the Court in *Milton v. United States, supra,* states at page 560:

> "Admissions have probative value, not because they have been subjected to cross-examination and therefore satisfy the Hearsay Rule, but because they are statements by a party opponent inconsistent with his present position as expressed in his pleadings and testimony."

Thus, we see that not only was Exhibit A admissible, but it was equivalent to affirmative *testimony* for the party offering it.

B. Appellant, as Matter of Fact, Remained in Mexico to Avoid or Evade Military Service Within the Meaning of 401(j) of the Nationality Act of 1940 (8 U. S. C. A. 801(j)).

Exhibit A with which appellant was confronted as his previous statements, is inconsistent with his present testimony, and which the Court obviously chose to believe, presents the following evidence:

That appellant knew almost all his life that he was a citizen of the United States; that he desired and intended to come to the United States for fifteen years more or less. [Ex. A, p. 8.] That although he was twenty-one years of age and a grown man in 1943, his father would not give him permission to come to the United States because he knew that he would have been liable for service in the Armed Forces of the United States. [Ex. A, p. 9.] That after reaching the age of twenty-one years, he could have come to the United States at any time, but his parents would not let him come on account of the war. "They were afraid to have me enter the United States Armed Forces"; that he remained in Mexico until after the war to comply with the wishes of his parents and remained outside the jurisdiction of the United States in time of war for the purpose of evading or avoiding training and service in the land or naval forces of the United States to please his parents [Ex. A, p. 10]; that he knew that the United States and Mexico were engaged in war against Germany and Japan and that the war be-

gan about 1940 and terminated in 1944 or 1945 [Ex. A, p. 11]; that he felt an obligation during the years 1942-1945, inclusive, to enter the United States to offer his services in the Armed Forces of the country but did not do so because "my parents would not let me on account of the war." [Ex. A, p. 12.]

The foregoing were appellant's admissions. He attempts to contradict said testimony by stating to the Court that he lived in the back country of Mexico, heard nothing of the war until he got on the bus to come to the United States in 1945, and that he learned while he was on the bus that America was at war, and that he did not learn who America was at war with until he arrived in the United States.

Obviously, the Court disbelieved this testimony, for as the Court states at page 57 of the transcript of record:

> "Mr. Widoff, his stories are so inconsistent, it is impossible to believe him."

The Court was the sole judge of the credibility of the witness and had a right to determine whether the witness had testified properly at the trial or had testified properly before the Board of Inquiry hearing. Having determined this question of fact, this Court will find ample evidence to support it, and appellee will spend no further time on this question.

C. Constitutionality.

Appellant finally relies upon the decision of the District Court in *Okimura v. Acheson,* and *Murata v. Acheson,* 111 F. Supp. 303 and 306, for the proposition that Section 401(j) of the Nationality Act of 1940 is unconstitutional. This decision nullifies the considered judgment of Congress as to the conditions under which a citizen of the United States by birth may lose his American nationality.

The decision completely disregards the decision of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests.

> *Savorgnan v. United States,* 338 U. S. 491;
> *Mackenzie v. Hare,* 239 U. S. 299.

See also:

> *Ex parte Griffin,* 237 Fed. 445 (N. D. N. Y.).

In *Miranda v. Clark,* 180 F. 2d 257, this United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940 providing for loss of citizenship by voting in a political election in a foreign state was constitutional. It ruled that the provisions of the statute:

> "Bind the Courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."

VII.
CONCLUSION.

The District Court in the instant case has passed on the credibility of the witness and the weight to be given his testimony. Inferences drawn from facts in evidence created a conflict which it was the duty of the trier of facts to resolve.

Cohen v. C. I. R., 148 F. 2d 336 (C. A. 2);
Elzig v. Gudwangen, 91 F. 2d 434 (C. A. 8);
Gibson v. So. Pac. Co., 67 F. 2d 758 (C. A. 5);
Quock Ting v. United States, 140 U. S. 417.

Wherefore appellee prays that the judgment of the District Court be affirmed.

Respectfully submitted,

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